

1 **UNITED STATES DISTRICT COURT**

2 **DISTRICT OF NEVADA**

3
4 MONTGOMERY, *et al.*,

5 Plaintiffs,

6 v.

7 ETREPPID TECHNOLOGIES, LLC,
8 *et al.*,

9 Defendants.

10 AND ALL RELATED MATTERS.
11

3:06-CV-00056-PMP-VPC
BASE FILE

3:06-CV-00145-PMP-VPC

ORDER TO SHOW CAUSE

12 Before the court is Dennis Montgomery (“Montgomery”) and the Montgomery Family
13 Trust’s (“the Trust”) (collectively the “Montgomery parties”) report regarding compliance with
14 this court’s May 29, 2008 order regarding source code discovery (#768).

15 **I. HISTORY & PROCEDURAL BACKGROUND**

16 This litigation involves a dispute between the Montgomery parties and Warren Trepp and
17 eTreppid Technologies, LLC (collectively “eTreppid”) over who owns the rights to certain
18 technology and trade secrets.¹

19 This Order To Show Cause stems from this court’s May 29, 2008 Order Regarding Source
20 Code Discovery (#645) (hereinafter “Source Code Order”). The Source Code Order resulted from
21 a discovery disagreement between the Montgomery parties and eTreppid over whether the trade
22 secret source code technology at issue in this case was relevant and necessary to the disposition
23 of the parties’ claims.² *Id.* After briefing, a hearing, and supplemental briefing, this court
24 concluded that production of the source code was essential to resolving the central issues in this
25

26 ¹ As this court and the parties are quite familiar with the involved history of this case, much of which
27 is irrelevant to the current issues before the court, the court does not set out the entire background.

28 ² The Montgomery parties define “source code” as “the human readable and modifiable version of
software programs, before it is compiled into machine-readable object code” (#672).

1 case. *Id.* The court ordered, with certain limits, that the Montgomery parties produce all
 2 documents, either in printed or electronic form, that are responsive to eTreppid's outstanding
 3 discovery requests seeking source code and other technology Montgomery claims as a trade
 4 secret. *Id.* The court further stated in paragraph V.5. of the Source Code Order that the
 5 Montgomery parties "shall file a discovery status report with this court no later than **Monday,**
 6 **June 30, 2008**, outlining its proposed timeline for compliance with this order, notwithstanding
 7 that any party may file an objection to this order pursuant to LR IB 3-2." *Id.* (emphasis in
 8 original).

9 On June 12, 2008, the Montgomery parties filed a paper entitled "The Montgomery
 10 parties' objections to Magistrate Judge's order re source code discovery and request for stay
 11 pending appeal" (#672). The Montgomery parties argued that this court had incorrectly applied
 12 the law with respect to production of trade secrets and that the trade secret source code has no
 13 relevance to either eTreppid's trade secret misappropriation claim or the Montgomery parties'
 14 copyright claim. *Id.* They requested that the District Court reverse the Source Code Order to the
 15 extent that it directs production of the Montgomery parties' trade secret source code.³ *Id.*

16 On June 17, 2008, this court held its monthly discovery status conference. The court
 17 noted for the record that while the Montgomery parties had purportedly filed for a stay of the
 18 Source Code Order, the request for a stay was made only in the title of their motion, and they had
 19 not articulated a basis for the stay within their objection (#700; *see also* transcript of hearing,
 20 #733). The court advised the parties that there was no stay of the Source Code Order in place.⁴

22 ³ Notably, the Montgomery parties continually refer to the source code as "Montgomery's" trade
 23 secret. However, ownership of the source code is a central issue in the case.

24 ⁴ During the June 17, 2008 hearing, this court stated:

25 The court, of course, is aware that the Montgomery parties filed an
 26 objection to this Court's order regarding Source Code. That objection is
 27 docket number 672. And, of course, as everyone is aware, that objection
 28 will be considered by Judge Pro.

The issue that I want to bring to everyone's attention is that, in the
 title of that objection, there is a request for stay pending appeal. But I

1 *Id.*

2 On June 20, 2008, the Montgomery parties filed a motion for an order shortening time for
3 hearing or other resolution of their motion for a stay of compliance with the Source Code Order
4 pending resolution of their objections to the Source Code Order (#692; *see also* #693). In that
5 motion, the Montgomery parties acknowledged the discussion with this court during the June 17
6 status conference that a stay was not currently in place. *Id.* The Montgomery parties stated that
7 the Source Code Order “directed the Montgomery parties to produce enormous amounts of
8 extremely sensitive trade secret information in contravention of controlling Ninth Circuit
9 authority and to begin that process prior to June 30.” *Id.* They further argued that such
10 compliance would “irreparably harm the Montgomery parties both by prejudicing them in the
11 litigation and by imposing enormous financial costs on them” because their objections to the
12 Source Code Order – then pending before the District Court – would not be addressed until after
13 June 30, 2008, and would, therefore, be mooted without a stay in place. *Id.*

14 On June 24, 2008, this court granted the Montgomery parties motion for order shortening
15 time on motion for stay of the Source Code Order, and requiring briefing completed by July 1,
16 2008 (#697). The Montgomery parties filed a second motion requesting an Order continuing the
17 June 30, 2008 deadline for compliance with the Source Code Order because although this court
18 had granted their motion shortening time, the motion for a stay of compliance with the Source
19 Code Order would not be resolved prior to the June 30, 2008 deadline for compliance set out in
20 the Source Code Order (#703). Again, the Montgomery parties noted that compliance with the
21 Source Code Order by June 30, 2008 would cause “significant irreparable prejudice” and
22 “enormous financial costs” on them. *Id.* eTreppid opposed the motion, arguing that compliance

23 _____
24 reviewed the objection to ascertain whether there was a basis articulated in
25 that objection for a stay, and there is not. The only reference to a request
for a stay is simply in the title, as far as I can tell.

26 And so as far as this court is concerned, with respect to the Source
27 Code order, there is no stay in effect. And unless and until such stay is
granted, the obligation to comply with that order is one that is outstanding.

28 (#733, p. 4).

1 with the Source Code Order would not cause harm to the Montgomery parties because the Source
2 Code Order did not set a date for production of the source code, it merely required the
3 Montgomery parties to file a discovery status report by June 30, 2008 outlining its proposed
4 timeline for compliance with the Source Code Order (#704).

5 On June 27, 2008, this court granted the continuance, stating: “The June 30, 2008 deadline
6 for filing a plan for production of source code contained in the order regarding source code
7 discovery (#645) is **STAYED** pending further order of this court” (#707) (emphasis in original).

8 On July 3, 2008, the District Court issued an order overruling the Montgomery parties’
9 objections and affirming this court’s Source Code Order (#728). In its order, the District Court
10 stated that “the discovery and analysis of the source code at issue in this case is clearly relevant
11 to the resolution of this action and the Montgomery Parties’ should forthwith comply with
12 Magistrate Judge Cooke’s order of production of the source code.” *Id.* The court lifted the June
13 27, 2008 stay order (#707) and ordered that “to the extent that they have not already done so, the
14 parties shall fully comply with Magistrate Judge Cooke’s Order Regarding Source Code
15 Discovery (Doc. #645) no later than Monday, July 21, 2008.” *Id.*

16 On July 15, 2008, this court held another discovery status conference. The Montgomery
17 parties informed this court that they would like to modify the existing trade secret protective order
18 but that eTreppid would not agree to a modification (#760). As such, the Montgomery parties
19 were considering filing a motion to request that either a special master be appointed to oversee
20 the trade secret discovery, or that the protective order be modified. *Id.* The court stated that if
21 the Montgomery parties intended to file such a motion, they could do so “within the next week,”
22 and that the motion would be briefed in the normal course. *Id.* The court specifically noted that
23 the current protective order remained in place. *Id.*

24 On July 18, 2008, the Montgomery parties filed an emergency motion for a stay of the
25 Source Code Order “to the extent it requires production of source code” so that they could seek
26 Ninth Circuit review of the Source Code Order via a Writ of Mandamus (#762). The
27 Montgomery parties requested that the stay remain in place until the Ninth Circuit ruled on their
28 Writ (which they stated they anticipated filing on July 21, 2008), or alternatively, until this court

1 ruled on their yet-to-be-filed motion to modify the protective order. *Id.* Although the
2 Montgomery parties acknowledged that the District Court had disagreed with their objections to
3 the Source Code Order that the production of the source code was not “necessary” to the
4 resolution of this case, the Montgomery parties stated that they were compelled to request review
5 of that decision by the Ninth Circuit because “the Court’s ruling threatens plaintiffs with the
6 irreparable loss of the very rights they brought this action to defend.” *Id.*

7 On July 21, 2008, the District Court denied the Montgomery parties’ emergency motion
8 for a stay of the Source Code Order, and ordered that the Montgomery parties “fully comply with
9 Magistrate Judge Cooke’s Order Regarding Source Code Discovery (Doc. #645) and this Court’s
10 Order (Doc. #728) no later than July 23, 2008” (#765).

11 On July 23, 2008, the Montgomery parties filed the notice presently before the court
12 (#768). In their notice, the Montgomery parties inform the court that they construe paragraph
13 V.5. of the Source Code Order as seeking a timeline for compliance to produce the source code
14 at issue. *Id.* The Montgomery parties state that they are in possession of electronic files
15 responsive to some of eTreppid’s discovery requests with respect to CD No. 1, that they are
16 “diligently searching” millions of files, and that they expect to be able to comply with the Source
17 Code Order by October 30, 2008. *Id.*

18 The Montgomery parties further state that “with respect to the source code developed by
19 Montgomery in the fields of object tracking, pattern recognition, and anomaly detection created
20 in or after 1998,” which the Montgomery parties contend was never transferred to eTreppid
21 pursuant to the Contribution Agreement, they will not be producing such documents. *Id.* The
22 Montgomery parties state that they “respectfully” disagree with this court and the District Court’s
23 orders, and that they “intend” to file a Writ of Mandamus with the Ninth Circuit to vacate the
24 Source Code Order to the extent it requires production of source code related to object tracking,
25 pattern recognition, and anomaly detection. *Id.* They further note that they intend to seek a stay
26 of the Source Code Order pending a determination of the Writ Petition. *Id.*

27 Finally, the Montgomery parties inform the court that they intend to seek a modification
28 to the protective order in this case, and state that if their Writ to the Ninth Circuit is denied, they

1 will only produce the source code related to object tracking, pattern recognition, and anomaly
2 detection “30 days after there has been a final determination on the Montgomery parties’ motion
3 to modify the protective order.” *Id.* They further inform the court that “any such production will
4 be pursuant to the terms of the protective order then in effect.” *Id.*

5 II. DISCUSSION

6 The court first notes that the Montgomery parties have taken a contrary position to their
7 prior contention with respect to what is required of them pursuant to the Source Code Order. In
8 at least three filings with this court, the Montgomery parties stated that it was their understanding
9 that the Source Code Order required them to start producing actual source code by June 30, 2008.
10 *See* #692, #693, and #703. The pattern and practice of the Montgomery parties in this case – to
11 take whatever position suits their needs at that immediate moment – makes their current
12 sentiments appear extremely disingenuous. As the participants in this case are all aware, this type
13 of flip-flopping has occurred over and over with respect to the Montgomery parties’ compliance
14 with this court’s discovery orders.

15 In drafting the Source Code Order, this court was very aware of the complicated
16 undertaking it was requiring of the Montgomery parties, and it endeavored to be reasonable about
17 the Montgomery parties’ compliance. However, even if the court were to construe as genuine the
18 Montgomery parties interpretation of the Source Code Order as merely requiring a timeline, the
19 notice before the court would be completely deficient. The Montgomery parties’ notice does not
20 set a proposed timetable or a plan delineating steps and intermediate deadlines by which they
21 would successfully comply with Source Code Order. Their notice simply states their
22 interpretation of the Source Code Order and successive court orders, and then sets their own
23 deadline for production. The Montgomery parties have been on notice that these documents
24 might be subject to discovery since mid-2006, but at the very least, by November 2007 (#431).
25 Once again, they protest that they do not have enough time.

26 Moreover, in complete defiance of *three* court orders requiring the production of source
27 code related to object tracking, pattern recognition, and anomaly detection, the Montgomery
28 parties state that they “respectfully” disagree. Notably, the Montgomery parties have continually

1 informed this court that they “intend” to file a Writ with the Ninth Circuit to vacate the Source
2 Code Order. To this court’s knowledge, this has not been done. Further, although they have
3 already sought and been denied a stay from the District Court pending appeal to the Ninth Circuit,
4 the Montgomery parties purport to grant themselves a stay in their notice by stating that they will
5 not produce any documents related to object tracking, pattern recognition, and anomaly detection
6 until after the Ninth Circuit has made a determination on their unfiled Writ. Finally, the court
7 notes that despite their assertions, the Montgomery parties have yet to request a modification of
8 the protective order.

9 It is quite clear to both this court and the District Court that the Montgomery parties’
10 “notice of compliance” represents their intent to defy the court’s orders by any means necessary.

11 **III. CONCLUSION**

12 Based on the foregoing and for good cause appearing:

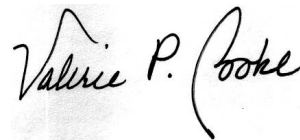
13 **IT IS HEREBY ORDERED** that a hearing to show cause as to why the Montgomery
14 parties and Deborah A. Klar, counsel for the Montgomery parties, should not be held in contempt
15 for failure to comply with the Source Code Order is set for **Monday, August 18, 2008, at 10:00**
16 **a.m.;**

17 **IT IS FURTHER ORDERED** that Dennis Montgomery shall appear in person at the
18 hearing to show cause and be prepared to testify as to the matters at issue in this order;

19 **IT IS FURTHER ORDERED** that Deborah A. Klar shall appear in person at the hearing
20 to show cause and be prepared to address the matters at issue in this order;

21 **IT IS SO ORDERED.**

22 **DATED:** July 24, 2008.



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24 **UNITED STATES MAGISTRATE JUDGE**
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